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20 **THE UNITED STATES DISTRICT COURT**  
21 **SOUTHERN DISTRICT OF CALIFORNIA**

22 WHITEWATER DRAW  
23 NATURAL RESOURCE  
24 CONSERVATION  
25 DISTRICT, *et al.*,

26 Plaintiffs,

27 v.

28 KIRSTJEN NIELSEN, *et al.*,

Defendants.

Case No. 3:16-cv-2583

**PLAINTIFFS' STATEMENT OF  
REASONS IN OPPOSITION TO  
DEFENDANTS' PARTIAL  
MOTION TO DISMISS COUNTS I  
AND II OF THE AMENDED  
COMPLAINT**

Date: March 12, 2018  
No Oral Argument Unless Requested by  
the Court

Hon. M. James Lorenz

1 Defendants, U.S. Department of Homeland Security (“DHS”) and U.S.  
2 Homeland Security Secretary Kristjen Nielsen, have failed to show that Counts I and  
3 II should be dismissed under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).  
4 Both Counts are brought under the National Environmental Policy Act (“NEPA”)  
5 and the Administrative Procedures Act (“APA”), and raise a federal question under 28  
6 U.S.C. § 1331. Both Counts also plead a valid claim for which relief can be granted  
7 under NEPA and the APA.

8 Count I’s challenge to DHS’s Instruction Manual 023-01-001-01, Revision 1  
9 (“the Instruction Manual”) is reviewable under NEPA and the APA because it is a  
10 challenge to a rule under 5 U.S.C. (4) (defining a rule as “the whole or part of an  
11 agency statement of general or particular applicability and future effect designed to  
12 implement, interpret, or prescribe law or policy or describing the organization,  
13 procedure, or practice requirements of an agency”). Defendants’ objection that the  
14 Instruction Manual cannot be challenged because it does not qualify as a rule and is  
15 not a final agency action fails. The Instruction Manual is final and binding and thus  
16 can be challenged under the APA.

17 Count II’s challenge to DHS’ statutory and executive programs under NEPA  
18 and the APA is also valid because Plaintiffs identify discrete actions that violate  
19 NEPA.

20 A Memorandum of Points and Authorities in support of Plaintiffs’ Opposition  
21 to Defendants’ Partial Motion to Dismiss Counts I and II of the Amended Complaint  
22 is filed herewith.  
23

24  
25 Dated: February 21, 2018  
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27  
28

1 Respectfully submitted,

2 /s/Julie B. Axelrod

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